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No. 83-867

In the Supreme Court of the United States

OCTOBER TERM, 1983

EAST CHICAGO REHABILITATION CENTER, INC.,
PETITIONER
v.
NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether substantial evidence supports the Board's finding that the walkout by some of petitioner's employees to protest its sudden, unilateral change in working conditions was not an attempt to usurp the Union's exclusive bargaining authority.

2. Whether the Board reasonably concluded that the walkout was not subject to the advance-notice requirement applicable to a "labor organization" under Section 8(g) of the National Labor Relations Act, 29 U.S.C. 158(g).

3. Whether substantial evidence supports the Board's finding that the two-hour walkout by nonprofessional employees constituting less than one-half of petitioner's dayshift did not jeopardize patient health or safety.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 4a-38a) is reported at 710 F.2d 397. The decision and order of the National Labor Relations Board (Pet. App. 39a-43a) and the decision of the administrative law judge (Pet. App. 44a-62a) are reported at 259 N.L.R.B. 996.[1]

JURISDICTION

The judgment of the court of appeals was entered on June 27, 1983 (Pet. App. 3a). A petition for rehearing was denied on August 24, 1983 (Pet. App. 2a). The petition for a writ of certiorari was filed on November 22, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1]The appendices to the petition contain two copies of the administrative law judge's decision (Pet. App. 44a-62a, 63a-81a).

STATEMENT

Petitioner is a rehabilitation center providing continuous nursing care to some 116 patients (Pet. App. 4a). In December 1978, the Board certified the Retail Clerks Union, Local 1460, United Food and Commercial Workers International Union (the Union) as the collective bargaining representative of petitioner's service and maintenance employees (*id.* at 5a, 44a, 46a). Shortly thereafter, the parties began negotiating a collective bargaining agreement (*id.* at 5a). During the bargaining session on June 11, 1979, Dr. Jerry Henderson, one of petitioner's part-owners, learned that petitioner's longstanding practice of permitting employees to leave the premises during their paid lunch periods subjected petitioner to potential workers' compensation liability for any injury an employee sustained while off the premises on a lunch break. Henderson announced that petitioner would have to stop the practice. The union negotiators objected to the proposed change (*ibid.*).

On June 15, without notifying the Union, petitioner implemented the new lunch policy by distributing a memorandum to its employees advising them that effective June 18 they would no longer be permitted to leave the premises during lunch and that they would be terminated immediately if they did (Pet. App. 5a). The first shift staff, numbering between 50 and 60 employees, received the memorandum at the beginning of their work day. They were upset by the change, and petitioner's management held two meetings with them regarding it (*ibid.*). During the second meeting with Administrator Steven Sanders, employee Ellis asked that the change be delayed, and Sanders said he would inquire whether a delay was possible (Pet. App. 50a; Tr. 336-337).[2] As the second meeting ended, 17 employees walked out to protest the change (Pet. App. 5a). The group

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[2]"Tr." refers to the transcript of the unfair labor practice hearing.

included nine nurses' aides, two housekeepers, one painter, one van driver, one occupational therapist, one secretary, one clerk, and one other employee whose job classification is not shown by the record (Pet. App. 16a, 42a; Tr. 415-417, 587, 721).

Upon walking out, the striking employees contacted the union representatives and informed them of petitioner's change in the lunch practice and the walkout (Pet. App. 5a, 50a; Tr. 606, 630). The union representatives went immediately to petitioner's premises and met with the striking employees, who were either inside or just outside the premises (Pet. App. 5a, 50a). The representatives told the employees that they should not have walked out and that the Union would not sanction their strike, and they asked whether the employees would return to work (*id.* at 5a). The employees agreed, and the union representatives conveyed the employees' offer to return to work to petitioner's management (*ibid.*). Management immediately rejected the employees' offer and informed the Union that the employees were suspended until petitioner's board of directors met to determine whether to discharge them (*id.* at 5a-6a). In all, about two hours elapsed from the start of the walkout to the employees' offer to return to work (*id.* at 6a).

On June 18, the Union and petitioner reached agreement on a contract, which converted the employees' lunch break to unpaid time and thus allowed them to leave the premises without exposing petitioner to liability; in lieu of the paid lunch break, the employees received two paid coffee breaks (Pet. App. 6a). On June 20, petitioner discharged the employees who participated in the June 15 walkout (*ibid.*).

2. The Board found, in agreement with the administrative law judge, that when the employees walked out to protest petitioner's unilateral change in their working conditions they were engaged in activity protected by the Act,

and therefore it held that petitioner violated Section 8(a)(1) of the Act, 29 U.S.C. 158(a)(1), by suspending and discharging the employees for engaging in the walkout. The Board rejected petitioner's contention that by walking out the employees had attempted to bargain independently of the Union and thereby engaged in unprotected conduct under *Emporium Capwell Co.* v. *Western Addition Community Organization (Emporium)*, 420 U.S. 50 (1975). The Board found that the employees were unaware that the lunch time policy change had been raised in bargaining, that the employees' protest over the new policy was not inconsistent with the Union's previously-voiced objection to that policy, and that the walkout was not an attempt to induce petitioner to deal directly with the employees rather than the Union over the change (Pet. App. 54a-56a).

The Board also rejected petitioner's argument that the walkout was subject to the strike-notification requirement of Section 8(g) of the Act, 29 U.S.C. 158(g), which provides that "[a] labor organization before engaging in any strike * * * or other concerted refusal to work at any health care institution shall, not less than ten days prior to such action, notify the institution in writing." The Board concluded that this provision in Section 8(g) applies only to actions called by a labor organization, and it found that the Union did not sponsor the walkout here (Pet. App. 52a-54a).

Finally, the Board found, contrary to petitioner's submission, that the walkout had not so disrupted patient care that the employees forfeited their protection under the Act. Based on the record evidence, the Board determined that, "[a]lthough some patient care schedules were not completely adhered to, there [was] no showing that the strike jeopardized any patient's safety or health" (Pet. App. 40a n.2).

The Board ordered petitioners, inter alia, to reinstate the discharged employees and to reimburse them for their lost earnings (Pet. App. 59a).

3. The court of appeals, with one dissent, affirmed the Board's decision and enforced its order (Pet. App. 4a-38a). It found that "[a] strike to protest a change in working conditions is within section 7's broad definition of protected activity" (Pet. App. 6a). The court rejected petitioner's contention that the employees' walkout was an attempt to usurp the exclusive bargaining authority granted the Union by Section 9(a) of the Act, 29 U.S.C. 159(a), and thus unprotected under *Emporium*. It concluded that there was substantial evidence to support the Board's finding that the strike was not intended to induce petitioner to bypass the Union and bargain directly with the employees (Pet. App. 7a, 10a-11a).

The court rejected petitioner's further contention that the strike was unprotected because neither the employees nor the Union gave the ten-day advance notice required by Section 8(g) of the Act. The court, in agreement with the Board, held (Pet. App. 12a-14a) that the requirement in Section 8(g) applies only to strikes sponsored by a labor organization, noting that "[e]very other [judicial] decision has read section 8(g) to mean what it says: the notice requirement is applicable only if the strike is by a labor organization" (Pet. App. 13a) (citations omitted). The court found "a mass of direct evidence" supporting the Board's finding that the Union did not authorize the strike (*id.* at 14a). The court also found, contrary to petitioner's contention, that the striking employees did not themselves constitute a labor organization as defined by Section 2(5) of the Act, 29 U.S.C. 152(5), because they lacked both the organization and purpose required by the statutory definition (Pet. App. 14a-15a).

The court also rejected petitioner's final argument that the walkout endangered patients and therefore lost its protection under the Act. The court concluded that substantial evidence supported the Board's finding that there was no

showing the two-hour strike by service and maintenance employees jeopardized health or safety (Pet. App. 15a-17a).

ARGUMENT

In challenging the decision below, petitioner raises the same three contentions rejected by the court of appeals in a thorough and well-reasoned opinion: (1) that the walkout was an attempt to attain separate bargaining with petitioner and thus was unprotected under *Emporium*; (2) that the walkout was subject to the advance-notice requirement in Section 8(g); and (3) that the walkout endangered the health and safety of the patients. The first and third issues are entirely fact-bound; the second issue has been addressed by several courts of appeals and the decision below adopts their unanimous view that Section 8(g) applies only to strikes called by a labor organization. Accordingly, further review by this Court is not warranted.

1. In contending (Pet. 10-13) that the decision below conflicts with this Court's holding in *Emporium*, petitioner essentially challenges the Board's factual finding, affirmed by the court of appeals, that the discharged employees, by walking off the job, were not attempting to bargain independently of the Union regarding the unilateral change in their working conditions. The court of appeals carefully considered whether the record supported petitioner's claim that the employees' conduct constituted an attempt to engage in separate bargaining as prohibited by *Emporium* and concluded that it did not. As the court explained (Pet. App. 6a-7a):

> [I]f the 17 workers had been striking to enforce a demand that the company bargain with them, rather than the union, over where they could eat lunch, the strike would not have been protected * * *. But that is not what the workers were doing. Their spontaneous, unorganized walkout in protest against the company's

> unilateral change in the conditions of their employment was not an effort to butt their way into the bargaining process but an instance of what section 7 protects under the rubric of "other concerted activities for the purpose of * * * mutual aid or protection."
>
> Thus this case is not like *Emporium Capwell Co.* v. *Western Addition Community Organization,* 420 U.S. 50 (1975), where a group of employees, dissatisfied with the union's representation, expressed "their desire to deal directly with 'the top management' of the Company over minority employment conditions, announced their intention to picket and institute a boycott of the store" to enforce this demand, and "were discharged for attempting to bargain with the Company * * *." *Id.* at 55, 60.

By claiming that the employees were attempting to bargain separately and that the court of appeals erred in finding *Emporium* distinguishable, petitioner seeks to have this Court reweigh the evidence underlying the above factual conclusion. This contention does not call for further review. *Universal Camera Corp.* v. *NLRB,* 340 U.S. 474, 491 (1951).

In any event, the evidence amply supports the Board's finding, accepted by the court of appeals, that the employees were not seeking separate bargaining. Immediately upon walking out the employees contacted the Union and relied solely upon it to settle both the strike and the underlying dispute — an action wholly inconsistent with a demand to bargain separately. Moreover, before walking out the employees were entirely unaware of the Union's position regarding the lunch time change, and at all events their protest was wholly consistent with the Union's already-voiced objection. In sum, as the court of appeals observed (Pet. App. 7a), "[petitioner's] workers expressed no dissatisfaction with the union and no desire to take negotiations

into their own hands. They merely wanted to show how angered they were by the unilateral change in the lunch rules." [3]

There is also no merit to petitioner's additional claim (Pet. 10) that the decision below conflicts with *NLRB* v. *Draper Corp.*, 145 F.2d 199 (4th Cir. 1944), and other cases concerning the "exclusive status of collective bargaining representatives." As the court of appeals explained in distinguishing the line of authority on which petitioner relies (Pet. App. 9a), these cases hold that employee efforts "to take over the collective bargaining function from the union" are unprotected. Thus, in *Draper*, the court held unprotected a strike by a minority of the bargaining unit to protest

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[3]This case is thus clearly distinguishable from the situation in *Emporium*. There, after renouncing the union's efforts to resolve claims of racial discrimination through the grievance procedure, one of the two employees involved met with the company president and said that "he wanted to discuss the problem perceived by minority employees"; he also said that the employees would not cease picketing the company with signs charging racial discrimination "until the president treated with them"; the other employee testified "that their purpose in picketing was to 'talk to the top management to get better conditions' "; he further stated that the two employees wanted to remedy the perceived racial discrimination "through 'group talk and through the president if we could talk to him,' as opposed to use of the grievance-arbitration machinery." 420 U.S. at 57-58 n.5.

Petitioner's description of *Emporium* (Pet. 12-13 n.9) is mistaken in two respects. First, *Emporium* did not hold that represented employees are required "to act" only through their union (Pet. 12). The only issue presented in *Emporium* was whether the Act protected employee efforts "to bargain" directly with the employer, and this Court, in agreement with the Board, held it did not. Second, *Emporium* did not equate an independent protest of an employer's policies with an unprotected attempt to engage in separate bargaining. Rather, in *Emporium* the testimony showed that the employees' true purpose in picketing was to coerce the company into bargaining with them; it was this testimony and not the picketing alone that the Board and the Court held indicative of an unlawful demand for separate bargaining.

the agreement between their union and the employer postponing negotiations; as the decision below stated (Pet. App. 9a), the employees in *Draper* "were striking as much against the union as against the employer." Similarly, in both *Food Fair Stores, Inc.* v. *NLRB*, 491 F.2d 388, 394 (3d Cir. 1974), and *Harnischfeger Corp.* v. *NLRB*, 207 F.2d 575, 578 (7th Cir. 1953), the employees struck to demonstrate dissatisfaction with their unions. And in *NLRB* v. *Sunbeam Lighting Co.*, 318 F.2d 661, 662, 663 (7th Cir. 1963), the employees struck to force their union to reject the company's contract offer. Here, as shown above, the record refutes any inference that petitioner's employees were striking to pressure the Union.[4]

2. As the court of appeals noted (see page 5, *supra*), the Board's position that Section 8(g) requires ten-days' advance notice only of strikes called or sponsored by a labor organization has been adopted by every circuit that has considered the issue. See *Montefiore Hospital & Medical Center* v. *NLRB*, 621 F.2d 510, 514-515 (2d Cir. 1980); *NLRB* v. *Long Beach Youth Center, Inc.*, 591 F.2d 1276, 1278 (9th Cir. 1979); *NLRB* v. *Rock Hill Convalescent Center*, 585 F.2d 700, 701 (4th Cir. 1978); see also *Kapiolani*

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[4]The other cases cited by petitioner (Pet. 10 n.8) also do not conflict with *Draper* or the decision below. In *Western Contracting Corp.* v. *NLRB*, 322 F.2d 893 (10th Cir. 1963), the employees struck to protest the employer's repeated failure to install truck heaters, a demand the union had always supported; the *Western* court itself found *Draper* "substantially different" from the case before it (332 F.2d at 893). In *Jones & McKnight, Inc.* v. *NLRB*, 445 F.2d 97 (7th Cir. 1971), employees struck to protest the employer's unlawful discharge of several fellow employees and not to "attempt to undermine their representative's position" (*id.* at 105). In *NLRB* v. *A. Lasaponara & Sons, Inc.*, 541 F.2d 992 (2d Cir. 1976), the employees struck over the employer's refusal to grant them a holiday on Palm Sunday, and in *Dreis & Krump Mfg. Co.* v. *NLRB*, 544 F.2d 320 (7th Cir. 1976), an employee distributed leaflets to his fellow employees to elicit support for his grievance, which the union was processing.

Hospital v. *NLRB*, 581 F.2d 230, 233 (9th Cir. 1978). Further review of this issue on which the courts of appeals are in accord is not warranted.

At all events, since the Board's interpretation of Section 8(g) is "reasonably defensible," the court below properly deferred to it. See *Ford Motor Co.* v. *NLRB*, 441 U.S. 488, 497 (1979); see also *NLRB* v. *Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170 (1981). As the court observed (Pet. App. 12a):

> Even a judge who was not a literalist in statutory interpretation, and who disregarded section 13 of the Act, [5] and the pointed warning by Senator Harrison Williams, a sponsor of the 1974 Health Care Amendments, that "this legislation is the product of compromise, * * * and the Labor Board should use extreme caution not to read into this Act by implication — or general logical reasoning — something that is not contained in the bill, its report and the explanation thereof," 120 Cong. Rec. 22575 (1974), and the explicit and as we shall see restrictive definition of labor organization in section 2(5), 29 U.S.C. § 152(5), would be hardpressed to interpret section 8(g) as if the words "labor organization" did not appear.

Moreover, the concern that led Congress to enact Section 8(g) — disruptions in patient care resulting from unanticipated strike activity — is adequately addressed by the Board's interpretation. As the court below explained (Pet. App. 12a-13a):

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[5]Section 13 of the Act, 29 U.S.C. 163, provides:

> Nothing in this [Act], except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

> The statute is not irrational when read, as it is written ("a labor organization before engaging in any strike * * * shall * * *"), to limit the notice requirement to strikes called by organizations — which will usually mean, by unions. Such strikes, at least if called without notice, generally are more costly than wildcat strikes. A union-authorized strike is apt to last longer, involve more workers, and command more support from other unions than a wildcat strike (though wildcat strikes, especially if protected by section 7, may be more frequent). This strike involved only one-third of the workers on only one of the employer's three shifts, lasted only two hours, and so far as appears was not part of a pattern of wildcat activity at the Center. [6]

Petitioner's further contention (Pet. 7-9) that the 17 striking employees constituted a "labor organization" as defined by Section 2(5) of the Act, 29 U.S.C. 152(5), and therefore were obligated to give notice pursuant to Section 8(g), only challenges the court of appeals' contrary factual determination (Pet. App. 14a-15a). Moreover, the record amply supports the court's conclusion that the employees did not

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[6]Relying on the remarks of Senator Taft and Representative Ashbrook, petitioner contends (Pet. 6-7 & n.5) that, although Section 8(g) expressly applies only to strikes by a labor organization, Congress actually intended it to apply as well to strikes not sponsored by a labor organization. Petitioner's reading is unsound and departs from the clear and express language of the statute. Representative Ashbrook's remarks indicate only that advance notice of a strike sponsored by a labor organization must be given either by union officials or by employees represented by the union. This statement neither contradicts the decision below nor "confirm[s]" (Pet. 6 n.5) Senator Taft's statement. And Senator Taft's comment during the debates does not override the plain language of Section 8(g) or the overwhelming legislative history that limits the applicability of the advance-notice requirement to strikes engaged in by a labor organization. See Pet. App. 12a; *Montefiore Hospital & Medical Center* v. *NLRB*, 621 F.2d 510, 514-515 (2d Cir. 1980); *Walker Methodist Residence*, 227 N.L.R.B. 1630, 1631 n.4 (1977).

constitute a labor organization. The strikers' reliance on the Union to settle both the strike and the underlying dispute demonstrates that they did not form even a loose organization to deal with petitioner over the issue. The record also refutes petitioner's characterization (Pet. 8) of the strikers as a group who demanded to meet with management, presented bargaining demands, and then walked out in support of their demands (see pages 2-3, 6-8, *supra*).[7]

3. Petitioner challenges (Pet. 13-14) the Board's finding, sustained by the court of appeals, that the two-hour walkout by one-third of the nonprofessional employees on petitioner's day shift did not jeopardize patient health or safety. This claim raises only a factual issue and does not require further review.[8]

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[7]The cases relied on by petitioner (Pet. 8-9 & n.6) are all readily distinguishable from this case. In each of those decisions, the employee group found to constitute a labor organization was not already represented by a union upon whom it relied to settle the matter in question; rather, the employees themselves decided to meet as a group with management to present specific demands (*NLRB* v. *Kennametal, Inc.*, 182 F.2d 817, 818 (3d Cir. 1950); *S & W Motor Lines, Inc.*, 236 N.L.R.B. 938, 942 (1978)), or the group's representative presented the demand on its behalf (*National Packing Co.* v. *NLRB*, 377 F.2d 800, 802 (10th Cir. 1967); *Pacemaker Corp.* v. *NLRB*, 260 F.2d 880, 883 (7th Cir.), enforcing 120 N.L.R.B. 987, 989, 997-998 (1958); *Rugcrofters of Puerto Rico, Inc.*, 107 N.L.R.B. 256, 259, 262 (1953)). Here, in contrast, the 17 employees never met as a group with management, and none of them ever presented a specific demand.

[8]Contrary to petitioner's contention (Pet. 14), the court of appeals applied the appropriate standard of review to the Board's finding that the walkout did not jeopardize patient health or safety. The appropriate legal standard is whether the factual finding is supported by substantial evidence, and this "standard is not modified in any way when the Board and its [administrative law judge] disagree." *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 496 (1951). The court of appeals expressly applied this standard (Pet. App. 15a), and petitioner's claim that it granted "excessive deference" is without basis.

In any event, the record amply supports the Board's finding that the brief walkout by the 17 employees — nurses' aides, housekeepers, a van driver, a painter, a clerk, a secretary, an occupational therapist, and one other employee — did not endanger the patients. As the court of appeals noted (Pet. App. 15a-16a):

> The strongest evidence is that when management learned that the workers were willing to resume work immediately it refused to take them back. Unless [petitioner] wanted to be prosecuted for criminal neglect it would not have done this if there were danger to its patients. It did not have to suspend the strikers on the spot even to preserve its claim to have a right to fire them for engaging in unprotected activity, for without any prejudice to its being able to fire them later it could have reinstated them temporarily till it lined up replacements, provided only that it made its intentions clear when it reinstated them.
>
> It must be, therefore, that [petitioner] could operate safely for several days without the 17 striking workers (that, or its management was behaving recklessly); if so, then it could operate safely for a few hours without them.

Moreover, during the walkout the remaining 30 to 40 day shift employees were able to complete standard morning care — feeding, bathing, cleaning, dressing, and medicating the patients (Tr. 46, 169, 170, 171-172, 397, 404, 413, 555, 571, 577, 586).[9]

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[9]Contrary to petitioner's contention (Pet. 14), the grant of the petition for a writ of certiorari in *Woodkraft Division, Georgia Kraft Co.* v. *NLRB*, No. 83-103 (Nov. 14, 1983), does not indicate the need for review in the instant case. The issue in *Georgia Kraft* — whether alleged misconduct by strikers away from the employer's premises justified a refusal to reinstate the strikers — is entirely unrelated to the issue here — whether substantial evidence supports the Board's finding that the walkout did not endanger patient health or safety.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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